court in any particular case to try such offence, but such authorization shall not enlarge powers conferred on the magistrate's court by subsection (5) of section 12 of this Code."

It is to be observed that section 9(1)(a) is an affirmative or enabling section which confers power and authority on every magistrate's court "subject to this Code" to try offences for which the maximum term of imprisonment provided by law does not exceed three years or which are punishable by fine only. Section 2 of the Code, the definition section, defines "offence" to mean "any act or omission made punishable by any law for the time being in force". Section 9(1)(a) is therefore a general provision conferring on a magistrate's court jurisdiction to try offences, whether Penal Code offences or offences under any other written law for the time being in force, which are punishable with a maximum punishment of three years or with fine only.

It is further to be observed that section 10 is also an affirmative or enabling section which, by paragraph (a) enables, *inter alia*, a magistrate's court "subject to the other provisions of this Code" to try *offences under the Penal Code* by reference to the eighth column of Schedule A to the Criminal Procedure Code. Under that column a magistrate's court may try an offence under section 420 of the Penal Code although the offence is punishable with a maximum punishment of seven years. It is settled law that a Schedule to an Act is to be read as and forms part of the Act and is not subservient to *that* Act.

It is further to be observed that under section 11 of the Criminal Procedure Code the written authorization of the Public Prosecutor authorizing a magistrate's court in any particular case to try an offence is required only "when under the provisions of section 10 the offence *is triable* by a district court but not by a magistrate's court". It follows in our view that *prima facie* where the eighth column of Schedule A to the Criminal Procedure Code shows that a particular offence is triable by a magistrate's court, the provisions of section 11 are inapplicable.

In our opinion the question before us must therefore be answered in the affirmative unless it can be said that section 10(a) is on its proper construction subservient to section 9(1)(a) because the opening words "subject to the other provisions of this Code" restrict the jurisdiction conferred on every magistrate's court by section 10(a) to those Penal Code offences for which the maximum punishment is three years or with fine only.

We are in complete agreement with the submission of the learned Attorney-General that the expressions "subject to this Code" and "subject to the other provisions of this Code" have exactly the same meaning and that these expressions which are found in sections 9 and 10 mean no more than to draw the attention of everyone that the particular section in which either of these two expressions appear may be qualified by other provisions of the enactment.

It seems to us there is no rule of construction that when a section in an enactment expressly confers jurisdiction on a court to try offences which are clearly enumerated in the enactment, it ought not to be construed to mean what it expressly enacts merely because there is an earlier (or later) section in the same enactment which also confers jurisdiction on the same court to try offences for which the maximum punishment is less than the maximum punishment provided by law under the section to be construed.

It is said that section 9(1)(a) and section 10(a) in so far as they confer jurisdiction on a magistrate's court are irreconcilable. We do not agree and in our judgment they are reconcilable if section 9(1)(a) is construed as a provision which deals with the general jurisdiction of a magistrate's court in regard to all offences under any written law in force for the time being and section 10(a) is construed as a provision which deals with Penal Code offences only and specifically sets out the court or courts which has or have jurisdiction in respect of each Penal Code offence.

In any event, assuming that there is such an irreconcilable conflict between these two provisions of the Criminal Procedure Code one of the principles of interpretation of statutes is that in the event of there being an inconsistency or conflict between two provisions of law, the one last enacted should prevail on the assumption that it is the last expression of the legislative will or intent that should prevail.

Accordingly, in our judgment the question of law of public interest which has been reserved for our decision must be answered in the affirmative. We would add that the court is indebted to Mr. Marshall who appeared before us as *amicus curiae* and to the Attorney-General for their assistance at the hearing of the reference.

Question answered in the affirmative.

WONG KON POH v. NEW INDIA ASSURANCE CO. LTD.

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) November 27, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 117 of 1970]

Practice and Procedure — Appeal — Extension of time — — Public interest.

Insurance — Motor insurance — Risk against "theft" — Whether loss by "robbery" covered by policy — Interpretation of insurance policy.

The appellant applied for special leave to appeal out of time against a judgment of the High Court (*ante* p. 131) dismissing his appeal against the decision of the magistrate dismissing his claim against the respondent insurance company for the loss of a motor-cycle in a robbery. The facts were shortly as follows: The applicant was a daily-rated labourer. In September 1967 having purchased a new Yamaha motor-cycle for $1,200, he insured it for $1,000 under a comprehensive policy whereby the respondent company undertook to indemnify him "against loss ... by ... burglary, housebreaking or theft". On November 24, 1967 the appellant was robbed by 4 persons of $5 in his pocket and his motor-cycle as well. He reported the matter to the police the same day and notified the insurance company of his loss on December 4, 1967. The insurers repudiated liability on the ground that "robbery" was not "theft". The magistrate's court dismissed his claim as it considered that "robbery" was distinguishable from "theft" and the High Court upheld that decision.

The Federal Court dealt with the application as the substantive appeal, and

Held, allowing the appeal: (1) a manifest injustice cannot be allowed to remain uncorrected. On this account an extension of time should be allowed, especially in the public interest;

(2) theft being an essential element of robbery, robbery is still theft, although in an aggravated form;

(3) a policy which insures against loss by "burglary, housebreaking or theft", but says nothing of "robbery", must on any reasonable construction be held to include "robbery" within the coverage for "theft".

FEDERAL COURT.

Teoh Hooi Leong for the appellant.

M. S. Naidu for the respondents.

Ong C.J. (delivering the judgment of the court): This is an application by notice of motion for special leave to appeal out of time against a judgment of the High Court at Kuala Lumpur given on June 29, 1970, dismissing an appeal against the decision of the magistrate's court dismissing the appellant's claim against the respondent insurance company for the loss of a motor-cycle in a robbery.

The appellant was a person earning only $3 to $4 as a daily-rated labourer. In September 1967, having purchased a new Yamaha 100 c.c. motor-cycle BS. 8942 for $1,200, he insured it for $1,000 under a comprehensive policy whereby the respondent company undertook to indemnify him "against loss . . . by . . . burglary, housebreaking or theft". On November 24, 1967 the appellant rode to Templer Park for a dip in the river. There he suffered the misfortune of being robbed by four persons of $5 in his pocket and his motor-cycle as well. He reported the matter to the police the same day and notified the insurance company of his loss on December 4. The insurers repudiated liability on the ground that "robbery" was not "theft". Compelled to pursue his claim in the magistrate's court — which was defended on the ground that "the loss was not caused by any of the perils insured against" — the appellant suffered the second misfortune of having it dismissed with costs simply because the learned magistrate considered that "robbery" was distinguishable from "theft".

He then appealed to the High Court on two grounds (a) error in law on the part of the magistrate and (b) that the loss "could not be the result of both theft and robbery". In other words, the appellant's contention was that, theft being an essential element of robbery, robbery is still theft, although in an aggravated form. Indeed, counsel was perfectly right in his submission, for section 390 of the Penal Code enunciates that "in all robbery there is either theft or extortion", and here it was a plain case of robbery. Theft is not severable from robbery any more than is a statue from the marble out of which it was hewed. Unfortunately for the appellant, however, the judge considered this argument "ingenious" but unacceptable. He agreed with the magistrate that the loss was due to robbery and took the view that "theft" and "robbery" were *not synonymous*. In his judgment he went on to say, "The appellant's counsel contended that these two words should be given their legal and technical meaning". We thought, on reading this sentence, that the negative must have been left out by a printer's error in the published report, on page 132 of [1970] 2 M.L.J., but the signed copy of the judgment examined by us showed there was no such fault of the printer. It would therefore appear that counsel must have been badly misunderstood, for the rule of construction in this type of cases is clearly set out in *MacGillivray on Insurance Law* (5th Ed.), 2026 as follows: —

"In a policy of insurance ... the words expressing the risk covered are not always used in the strict technical sense which they bear in relation to a criminal offence."

It is to be observed that "burglary" is not a technical term used anywhere in our Penal Code. Burglary at common law is the breaking and entering the dwelling house of another person in the night with intent to commit some felony therein. This common law definition was embodied in section 25(1) of the Larceny Act 1916. The term equivalent to burglary in this country is "housebreaking by night": see sections 445 and 446 of the Penal Code. Since the risk is not described in the technical sense by the term "burglary", we do not think that, when "theft" is used in juxtaposition to burglary and housebreaking, it nevertheless had to be construed in the strict technical sense, against the insured. Indeed we are not aware of any insurers hitherto repudiating liability simply on the ground that "robbery" is not a risk covered by insurance against "theft". As Ali F.J. pointed out, where a thief attempted to sneak off on the appellant's motor-cycle and managed to do so, it was of course a case of theft, which was covered by the policy; but, if the thief, while interrupted in the act, drew a dagger and warned the appellant not to prevent his get-away, how in the name of commonsense can it be argued that the taking, in the latter case, was not as much a risk insured against as the taking by stealth?

If, contrary to commonsense, the insurance company still maintains that the perils insured against are different, so that it is not bound to indemnify the victim of a robbery where the policy covers only loss by theft, then it is the duty of the insurers to say so in plain terms, so that policy-holders may not continue to pay their premiums under a misapprehension as to the exceptions to liability. In paragraph 703 of *MacGillivray* the *contra proferentem* rule is thus set out: —

"If there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases, against the company. A policy ought to be so framed that he who runs can read".

At all events, to deny the axiomatic truth of the proposition that "robbery is an aggravated form of theft" and to dismiss the appeal on that ground is manifestly a denial of justice upon a technical defence which has absolutely no merits. A policy which insures against loss by "burglary, housebreaking or theft", but says nothing of "robbery", must on any reasonable construction be held to include "robbery" within the coverage for "theft". Like burglary or housebreaking, robbery is merely a variation of the same theme. Otherwise its exception must clearly and expressly be made known to the party insured — not by implication to be inferred from the omission. To require that the

ordinary man taking out a policy should read into it not only what was expressed, but also to construe omissions as exceptions, is an absurd proposition which this court cannot countenance.

The learned judge further stated as one of his grounds of decision that "The risk involved in theft is different from and less serious than the risk in robbery. The insurance premium for one would be different from the other". With respect, there is not an iota of evidence regarding the different rates of premium charged, for nothing is said of robbery. Two cases were referred to by the judge as being in point. With respect, we do not think they bear any relevance whatsoever to the issue raised and do not call for further comment except this: that in our opinion the risk of loss by theft under the policy in question undoubtedly also covers loss by theft in any aggravated form. It is true that "any risk which does not answer to the description in the policy is not covered by the policy": see *Shawcross on Insurance* (2nd Ed.) p. 496. But loss by robbery is no more preventable by any precaution on the part of the insured than in the case of theft. How the risk can be considered different between loss by robbery and loss by theft is quite incomprehensible to us. An aggravation of the *offence* of theft is not in any manner an aggravation or extension of the *risk* insured against.

We have dealt with this application as the substantive appeal — having given notice to this effect to counsel for the parties. A manifest injustice cannot be allowed to remain uncorrected. On this account there is no reason why extension of time should not be allowed, especially in the public interest and for the further reason that counsel has even volunteered to pay the sum required as security for costs out of his own pocket.

We would allow this appeal and give judgment for the appellant in the sum of $1,000 (which should be the fair value of the motor-cycle after allowing $200 depreciation for two months' use) and costs here as well as in both the courts below.

Appeal allowed.

Solicitors: *Teoh & Foo; Braddell & Ramani.*